S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

FEDERAL INSURANCE COMPANY, NORVEST, L.L.C., and NORQUICK DISTRIBUTING COMPANY, Plaintiffs-Appellants,	UNPUBLISHED May 6, 2008
v CONBRACO INDUSTRIES, INC., Defendant/Cross Defendant/Third Party Plaintiff-Appellee, and NORTHERN INDUSTRIAL REFRIGERATION, INC., Defendant/Cross Plaintiff-Appellee, and MIDWEST REFRIGERATION SYSTEMS, INC., Defendant/Cross Plaintiff/Cross Defendant-Appellee, and BIDDISON ARCHITECTURE, KEVIN L. BIDDISON, GARY PARADIS ASSOCIATES, INC., and ELECTRA TECH SERVICES, L.L.C., Defendants, and P. WILLIAM CONNOR, JOHN CONNOR, and MICHAEL McMANAMON, Third-Party Defendants.	No. 274351 Wayne Circuit Court LC No. 01-140483-NZ

CITIZENS INSURANCE COMPANY,
NORVEST, L.L.C., and NORQUICK
DISTRIBUTING COMPANY,

Plaintiffs-Appellants,

v

No. 274421
Wayne Circuit Court
LC No. 03-300806-NZ

NORTHERN INDUSTRIAL REFRIGERATION, INC.,

Defendant/Cross Plaintiff-Appellee,

and

CONBRACO INDUSTRIES, INC.,

Defendant/Cross Defendant-Appellee,

and

MIDWEST REFRIGERATION SYSTEMS, INC.,

Defendant/Cross Plaintiff/Cross Defendant-Appellee.

Before: O'Connell, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Plaintiffs Federal and Citizens appeal as of right[1] the trial court's decision to grant summary disposition to defendants Conbraco, Midwest, and Northern Industrial Refrigeration (NIR). We affirm in part, reverse in part, and remand for further proceedings.

[1] The record reflects that issues regarding the architect for plaintiff Norvest's warehouse were still pending final resolution in arbitration, calling into question whether the order finally granting defendant NIR summary disposition was a "final order." See MCR 7.202(6); MCR 2.604(A). For the sake of judicial economy, we exercise our discretion to treat plaintiffs' claims of appeal as applications for leave to appeal, and we grant them. See *In re Morton*, 258 Mich App 507, 508 n 2; 671 NW2d 570 (2003).

This case arose when an employee for plaintiff Norquick, Michael McManamon, decided to drain pots that collected oil from the massive anhydrous ammonia refrigeration system that Norquick rented from Norvest. McManamon admitted that he had no training, certification, qualification, or expertise with performing the particular maintenance on the ammonia system, but he decided to perform the task to save NIR's specialists a trip in from Grand Rapids.

NIR built the system for Norvest and continued to maintain the system for Norquick. NIR regularly drained the oil pots at issue once every six months or so, and they could go for years between draining without hurting the system. McManamon watched NIR staff drain the pots and asked questions about the procedure. One of NIR's maintenance workers, William Van Dyke, admitted talking casually to McManamon about the procedure, but both Bruce Wilson, who owned NIR, and Van Dyke each testified that nobody at NIR ever offered McManamon any training regarding the oil drain procedure. McManamon admitted that he took it upon himself to drain the oil without any training, special qualifications, or certification. He also testified that NIR never trained him, he never asked for training, and that he did not recall ever telling anyone at either NIR or Norquick that he was draining the oil pots. Wilson testified that he did not know McManamon had ever drained the pots, and he confirmed that nobody at Norquick had the requisite certification to perform maintenance on the actual ammonia system.

NIR drained the pots on January 10, 2000, without incident. McManamon drained them on January 11 without incident, and then he decided to drain them again the next day. When he drained the medium-temperature pot on January 12, he first opened up a globe valve all the way with a ratchet wrench and then opened a quarter-turn, spring-loaded ball valve, which allowed the pot to drain at its maximum rate of flow. He did not first isolate the oil pot from the rest of the system, which also increased the rate of flow. He filled the five-gallon bucket with ammonia and oil in about three seconds and was about to release the spring-loaded handle to the ball valve when the handle came off in his hand. He dropped the handle and tried in vain to shut off the globe valve. He went to retrieve another bucket, but soon pure ammonia escaped from the open valve. He shouted for coworkers to evacuate and call 911, and then he returned with a ventilation mask and tried the wrench again. He could not get the globe valve closed, and he repeatedly dropped his wrench. Eventually he was overcome by ammonia and fled the machine room. The fire department had no safe access to the valve, and the spill went unabated. Eventually, the cloud of vaporized ammonia hit a spark, exploded, and caused a fire. Nobody was seriously injured in the disaster.

Federal represents the interests of Norvest and Norquick, which lost stock and business, and Citizens represents the interests of two grocers whose stored food was potentially contaminated by contact with ammonia. Conbraco made the handle and ball valve at issue, and Midwest supplied the valve and all the other components for the system to NIR so that NIR could install it and make the refrigeration system operational. Midwest also supplied a diagram reflecting the basic design for the refrigeration system.

Plaintiffs first argue that the trial court erred by determining that the refrigeration system was a "good" within the meaning of the Uniform Commercial Code. We agree. We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

According to MCL 440.2105(1), a good must be "movable at the time of identification to the contract for sale . . . ." It is clear that NIR contracted with Norvest to install the refrigeration system and to refrigerate the Norvest warehouse, so the item for "sale" was a complete, installed, and functional system. Moreover, the contract did not call for specifically identified components, but simply for the installation of a functional whole. Therefore, the system was not identified to the NIR contract until it was installed, at which time it was not movable. Because the focus of the contract between NIR and Norvest was a completed refrigeration system, the item was not "movable" at the time of its "identification to the contract for sale," so it was not a good within the meaning of the UCC. Therefore, neither the economic loss doctrine nor the four-year statute of limitations in MCL 440.2725 applied to restrict plaintiffs' recovery from NIR.

However, the trial court correctly applied the economic loss doctrine and the UCC's statute of limitation to Conbraco and Midwest. See *Neibarger v Universal Cooperatives*, *Inc*, 439 Mich 512, 520-521; 486 NW2d 612 (1992). Conbraco's role in the claimed loss was limited entirely to designing and manufacturing the spring-loaded valve, and Midwest's role in the loss was limited to supplying the valve. See *Citizens Ins Co v Osmose Wood Preserving*, *Inc*, 231 Mich App 40, 45-46; 585 NW2d 314 (1998). Midwest's diagram of the commonplace system was essentially copied from an industry handbook, and NIR had discretion to alter it to fit any particularities the project required. Therefore, Midwest's role in "designing" the system was a minor service compared to its responsibility of providing all the system's components. See *Neibarger*, *supra* at 534-536. Furthermore, Midwest's owner testified that its price was solely determined by a standard markup on the components provided, and the NIR's contract with Norvest plainly reflects that Midwest was predominantly involved in the system's construction as the supplier of its component parts. Therefore, the predominant factor in Midwest's transactions was the sale of goods, and the trial court did not err in applying the UCC's statute of limitations to Midwest and Conbraco. *Id*.; MCL 440.2725.

Nor did the trial court err in applying the economic loss doctrine to both of these plaintiffs. Simply put, if a plaintiff's tort claims "arise from a commercial transaction in goods and the plaintiff suffers only economic loss, . . . such claims are barred by the economic loss doctrine." *Neibarger*, *supra* at 520. Both plaintiffs represent the interests of commercial entities that had a contractual connection with either Norquick or Norvest. In turn, these entities had contractual relationships with NIR, Midwest, and Conbraco. It is undisputed that the handle at issue was intended for industrial, commercial, use by Conbraco, and the present lawsuit does not relate to any claim of personal injury. *Id*. at 520-521. Under the circumstances, each plaintiff represents interests that were adequately protected from any defect in the valve by ordinary contractual remedies. The parties' various contracts and responsibilities reflect a series of commercial decisions and transactions traceable back to defendant Midwest and, ultimately, Conbraco. *Id*. Because the commercial rights represented by plaintiffs in this case never involved damage beyond foreseeable economic loss that might result from the failure of the various contracts to meet the parties' expectations, the economic loss doctrine applies to limit plaintiffs' claims against Midwest and Conbraco to those claims found in the UCC and controlled by its four-year statute of limitations. *Id*. Because neither plaintiff brought its claims within four years after the valve was delivered to the Norvest site, the trial court correctly dismissed, as untimely, all of plaintiffs' claims against Midwest and Conbraco.

Plaintiffs also argue that the trial court erred by dismissing certain negligence claims against NIR.[2] They first argue that the trial court should not have dismissed their claim that NIR negligently failed to train McManamon how to drain the oil pots safely. We disagree. "It is well-established that prima facie case of negligence requires a plaintiff to prove four elements: duty, breach of that duty, causation, and damages." *Fultz v Union-Commerce Associates*, 470 Mich 460, 463; 683 NW2d 587 (2004). When the question of duty involves matters of public policy, courts should determine the existence of the duty as a matter of law. *Williams v Cunningham Drug Stores*, *Inc*, 429 Mich 495, 500-501; 418 NW2d 381 (1988).

In this case, plaintiffs fail to point to any justification for contravening the general rule that "there is no duty that obligates one person to aid or protect another." *Id*. at 499. The relevant parties, NIR and Norquick, had only a business relationship, but it was consistent enough that, for two years, NIR regularly drained the oil pots, billed Norquick for the service, and never received any indication that McManamon or anybody else at Norquick might try to perform that specialized task. See *Krass v Tri-County Security*, *Inc*, 233 Mich App 661, 668-669; 593 NW2d 578 (1999). Moreover, McManamon testified that NIR never endeavored to train him to drain the pots, so plaintiffs' claims turn on the general duty to provide training in the first place, not on any deficiency in the training received.[3] Recognizing this duty would essentially require NIR to teach its client how to minimize its reliance on the services NIR provided. It would also require NIR to train an individual that lacked the requisite certification and skill merely because the individual received training in basic maintenance of other equipment or watched while NIR staff performed a service call.[4] We hesitate to hold members of the various construction trades responsible for apprenticing their unqualified clients merely because the member has ventured to explain a procedure or demonstrate a task for their client's edification.

Nor are we persuaded by Citizens's argument that a tag on the spring-loaded handle created a duty to train McManamon. The tag was attached to the handle by the manufacturer, and it generally explained how to operate the handle in conjunction with a globe valve, but it did not suggest first isolating the oil pot. Given the fact that neither Wilson nor McManamon paid any attention to the tag, we are not convinced that the mere presence of the tag's safety precautions meant that NIR was supposed to train McManamon how to perform the entire operation. The tag alone did not significantly raise any expectation or amplify the foreseeability

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[2] Plaintiffs do not appeal the trial court's decision to dismiss the balance of plaintiffs' negligence claims against NIR, which dealt more directly with their role in assuring the safety of the handle.

[3] We are not persuaded by plaintiffs' argument that NIR "voluntarily" undertook to train McManamon, so it had a duty "to perform the act in a nonnegligent manner." *Fultz*, *supra* at 465. In this case, there was no evidence that NIR ever attempted or volunteered to train McManamon how to drain the pots. Because NIR never volunteered to train McManamon in the oil drainage process, any claim of a duty to train must arise from some other relationship of the parties that created an enforceable social obligation for NIR. *Krass*, *supra*.

[4] This is akin to requiring plumbing installers to train a homeowner how to fix leaks, or risk paying damages if the homeowner tries to fix a leak and floods the whole house.

that McManamon would take it upon himself to drain the pots. Weighing the public policy implications of imposing this duty on NIR, we agree with the trial court that NIR had no duty to train McManamon how to drain the oil pots. *Krass*, *supra*.

Plaintiffs also argue that the trial court erred by dismissing their claims that NIR negligently failed to warn McManamon not to drain the pots. We disagree. Plaintiffs again fail to demonstrate that NIR owed McManamon any duty to warn him not to drain the pots. Fundamentally, they do not explain how any warning provided by NIR would have provided McManamon with any information that he did not already know. McManamon knew that ammonia was dangerous, that it could be released from the drainpipe, and that he was not qualified or trained to drain the oil pots. Plaintiffs did not demonstrate that NIR knew that the handle was going to come off or that McManamon was draining the pots with an improper and unsafe procedure. Therefore, there was no latent danger that NIR was privy to and that McManamon was ignorant about, which is generally the only type of situation in which a duty to warn makes sense. See *Farm Bureau Mutual Ins Co v Combustion Research Corp*, 255 Mich App 715, 726; 662 NW2d 439 (2003). Although plaintiffs claim that NIR assumed the responsibility to warn after demonstrating an incorrect procedure for draining the pots, NIR's actions did not appreciably increase the foreseeability that McManamon would attempt the procedure without first receiving some actual training. See *Buczkowski v McKay*, 441 Mich 96, 104-105; 490 NW2d 330 (1992).

Our decision in *Farm Bureau*, is not to the contrary. In that case, the provider of the heating system stopped to check in on the client and noticed a dangerous condition caused by a "fire tube" running through a "combustible wall." *Farm Bureau*, *supra* at 717. The defect in that case was obvious to the heating company, but not within the ordinary knowledge of the owner. In the case at bar, case, the proposed warning would amount to little more than "do not do the dangerous thing that you already know you should not do because it is dangerous." Nevertheless, plaintiffs argue that the tag had incomplete instructions, so it created a duty to warn. As with the argued duty to train, however, the tag did not substantially increase the likelihood that an untrained and unqualified individual would casually decide to undertake the dangerous draining operation. Nothing indicates that the tag on the handle was ever noticed by either Wilson or McManamon, and McManamon certainly did not follow the more reasonable approach suggested on the tag. Therefore, the tag alone did not create a foreseeable danger that an inexperienced individual would simply decide to try his hand at maintaining a system containing hazardous anhydrous ammonia. Because NIR did not have any special insight into whether one of Norquick's staff would act so recklessly, the argued duty to warn did not attach. *Id*. at 726-727. Moreover, if the duty to warn arose merely from the existence of the tag, then the "wrong" NIR committed was leaving the tag in place without warning Norquick. MCL 600.5827. Because the tag was put in place in late 1997, none of the negligence claims arising from it are timely. MCL 600.5805(10).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher